85-1183

Supreme Court, U.S.
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No. - .

In the

Supreme Court of the United States.

OCTOBER TERM, 1985.

P.B.C.,
PETITIONER,

v.

D.H.,
RESPONDENT.

Brief in Opposition to Petition for Certiorari to the Supreme Judicial Court of Massachusetts On Behalf of Respondent N.H., Minor Child.

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48 pp

Questions Presented.

I. Does due process of law compel the state to create a forum in which the legitimacy of a child conceived by a married woman may be challenged by a stranger to the marriage when the husband of the woman acknowledges the child as his own and the mother and her husband resume living with the child in a family unit?

II. Does the Equal Protection Clause require a state to provide a forum in which a putative father who is not married to a woman may raise the issue of paternity of a child conceived by the married woman when the woman or her husband have not denied the paternity of the husband?

III. Does a family unit consisting of a mother, her husband and a child conceived by the woman during marriage enjoy a constitutional right of privacy which immunizes them from legal compulsion to submit to paternity proceedings and blood testing in an action brought by a stranger to the marriage in a state court?

Parties.

The respondent N.H. child (hereafter referred to as "the child") is the minor child of the respondent D.H. (hereafter referred to as the "the mother"). The petitioner P.B.C. (hereafter referred to as "the petitioner") brought this action against the mother, asking for a declaration that he is the natural father of the child. The child has been and is represented by separate counsel. The husband of the mother (hereafter referred to as "the husband") is not a party to this litigation. The child opposes the petition for a writ of certiorari.

Table of Contents.

Statement of the case 1

Statement of facts 4

Reasons for denying the writ 5

I. No plausible due process analysis can be made in the circumstances of this case for granting relief to the petitioner and no novel and important due process issue is raised by the petition 5

II. In granting summary judgment in the circumstances of this case Massachusetts has not denied equal protection of the law 10

III. The family enjoys a right to privacy against legal compulsion to submit to paternity proceedings and blood testing in an action brought against its members by a stranger 12

Conclusion 15

Appendices follow page 15

Table of Authorities Cited.

CASES.

A v. X, Y and Z, 641 P.2d 1222 (Wyo. 1982) 11

Board of Regents v. Roth, 408 U.S. 564 (1972) 8

Caban v. Mohammed, 441 U.S. 380 (1979) 7, 10

Califano v. Goldfarb, 430 U.S. 199 (1977) 11

Craig v. Boren, 429 U.S. 190 (1976), *reh. den.*, 429 U.S. 1124 (1977) 11

Griswold v. Connecticut, 381 U.S. 479 (1965) 14

Kirchberg v. Feenstra, 450 U.S. 455 (1981) 10

Lehr v. Robertson, 463 U.S. 248 (1983) 7

Loving v. Virginia, 388 U.S. 1 (1967) 13
Meyer v. Nebraska, 262 U.S. 390 (1923) 13
Moore v. East Cleveland, 431 U.S. 494 (1977) 13
NAACP v. Alabama, 357 U.S. 449 (1958) 14
Orr v. Orr, 440 U.S. 268 (1979) 11
People in Interest of S.P.B., 651 P.2d 1213 (Colo. 1982) 12
Pierce v. Society of Sisters, 268 U.S. 510 (1925) 13
Planned Parenthood of Central Missouri v. Danforth, 428 U.S. 52 (1976) 12
Poe v. Ullman, 367 U.S. 497, *reh. den.*, 368 U.S. 869 (1961) 14
Prince v. Massachusetts, 321 U.S. 158, *reh. den.*, 321 U.S. 804 (1944) 14
Quilloin v. Walcott, 434 U.S. 246 (1978) 7
Roe v. Wade, 410 U.S. 113, *reh. den.*, 410 U.S. 959 (1973) 12
Santosky v. Kramer, 455 U.S. 745 (1982) 7
Skinner v. Oklahoma, 316 U.S. 535 (1942) 13
Smith v. Organization of Foster Families for Equality and Reform, 431 U.S. 816 (1977) 7, 8
Stanley v. Illinois, 405 U.S. 645 (1972) 7, 8, 10
Stanton v. Stanton, 421 U.S. 7 (1975) 11
Trimble v. Gordon, 430 U.S. 762 (1977) 14
Wengler v. Druggists Mutual Ins. Co., 446 U.S. 142 (1980) 10, 11
Zablocki v. Redhail, 434 U.S. 374 (1978) 13

CONSTITUTIONAL PROVISIONS.

United States Constitution
First Amendment 13
Ninth Amendment 13, 14
Fourteenth Amendment 13

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Brief in Opposition to Petition for Certiorari to the Supreme Judicial Court of Massachusetts On Behalf of Respondent N.H., Minor Child.

Statement of the Case.

Petitioner filed a complaint against the mother in the Massachusetts Probate and Family Court for Middlesex County seeking a declaratory judgment and equitable relief, specifically seeking a determination that he is the natural father of the child. An independent attorney was appointed to represent the child, and the child has thereafter participated in all stages of this litigation through counsel.

The petitioner filed a motion to require the mother and the child to submit to a Human Leukocyte Antigen (HLA) white blood cell test, and mother and child were ordered to submit to such a test after various proceedings. The mother then filed a motion to dismiss which was denied by a judge of the Massachusetts Probate and Family Court (App. III at 22a). The same judge then ordered the mother and child to submit to the HLA blood test within thirty days, and stated that if the mother did not comply with this order the judge would consider imposing various sanctions, including prohibiting the mother from presenting any evidence at trial, incarceration and/or the assessment of daily costs (App. III at 22a).

The mother sought leave to file an interlocutory appeal, and the Supreme Judicial Court of Massachusetts granted direct appellate review. The Supreme Judicial Court reversed and remanded, ordering the Probate and Family Court to dismiss the complaint (App. II at 17a). In doing so, the Supreme Judicial Court treated the mother's motion to dismiss as a motion for summary judgment (App. II at 11a) and considered the following facts from the pleadings, affidavits and briefs filed by the petitioner, the mother and the child as to which there was no controversy (App. II at 11a):

1. The mother and the petitioner had a sexual relationship prior to September, 1981 while she was married to her present husband.

2. The mother filed a complaint for divorce in May 1981.

3. The child was conceived in September, 1981.

4. A divorce judgment nisi was entered on December 8, 1981.

5. The divorce became final on June 9, 1982.

6. The child was born one day after the divorce became final, on June 10, 1982.

7. The birth certificate lists the husband of the mother as the father of the child.

8. The child lived with the mother at all times after its birth and never lived with the petitioner.

9. Since September, 1983 the mother has not allowed the petitioner access to the child.

10. The mother remarried her husband on September 12, 1983.

11. The petitioner filed his complaint on September 6, 1983.

12. The husband never denied that he was the father of the child.

13. Since September 1983 the mother, the husband and the child have lived together continuously as a family, together with an older child of the mother and her husband.

The Supreme Judicial court held that the mother was entitled to summary judgment. A child conceived by a married woman is presumed to be the child of the man to whom she is married, even if the woman and her husband are divorced at the time of the child's birth. This rule was said by the Massachusetts court to foster the important social policy of affording legitimacy to children whenever possible (App. II at 14a).

Recognizing that Massachusetts law permits the rebutting of the presumption of legitimacy only on facts which prove beyond all reasonable doubt that the husband could not be the father of a child conceived or born to his wife, the court ruled that a stranger to the marriage is not in the same position as the mother and her husband to challenge the legitimacy of the child because the mother and her husband "constitute a family unit." (App. II at 16a.) A challenge to the husband's paternity brought by a stranger in the circumstances of this case has "the likely effect of seriously disrupting an intact marriage and family contrary to the interests of the Commonwealth." (App. II at 16a.)

Statement of Facts.

The petitioner has included in his petiton for a writ of certiorari numerous allegations of fact which were not considered by the Massachusetts Supreme Judicial Court in its determination that the mother was entitled to summary judgment. In an affidavit filed with the Massachusetts Probate and Family Court the mother under oath denied many of these allegations, specifically stating that she never had sexual relations with the petitioner after August, 1981 (App. I at 3a); that she resumed sexual relations with her husband in August, 1981 (App. I at 3a); that she had sexual relations with her husband on September 5, 1981, at which time the child was conceived (App. I at 3a); that the mother and her husband decided to let the divorce proceedings continue and then re-marry in order to avoid further "involvement with legal proceedings" and the petitioner who had obtained as legal counsel for the mother the same law firm which handled his divorce (App. I at 2a, 4a); that at the time of the divorce becoming absolute and the birth of the child the mother and her husband were living together as husband and wife and holding themselves out as a family unit (App. I at 4a); that on the birth of the child the husband acknowledge the child as his own and thereafter the mother, her husband and the child continued to live together as a family (App. I at 4a); that the mother informed petitioner he was not the father of the child (App. I at 4a); that the mother never asked petitioner to support the child (App. I at 5a); that petitioner made continuing efforts to disrupt the mother's relationship to her husband and family (App. I at 6a); that the mother rented an apartment from the petitioner in Lexington, Massachusetts, in order to have access to the school system in that town, and that her husband frequently stayed there and continued to provide support for both children (App. I at 6a); that petitioner's only contact with the child was through the fact that his daughter served as a babysitter for the child (App. I at 6a);

that since September, 1983 the mother and her husband have lived as a family unit with the child and his older sister and that the family relationship has "flourished" (App. I at 7a); and the litigation instituted by the petitioner has taken a great toll on the wife and her husband "emotionally and financially" (App. I at 8a).

Because many of the allegations made by the petitioner in his complaint, affidavit and briefs in the proceedings below (which are now realleged in the "Statement of Facts" contained his petition for a writ of certiorari filed in this Court) are disputed by the affidavit and pleadings filed by the mother, the Supreme Judicial Court of Massachusetts made no assumptions as to these facts in controversy. The Massachusetts court noted that "[r]esolution of the controverted facts would not affect our decision" (A. II, n.1 at 11a).

Reasons for Denying the Writ.

I. No Plausible Due Process Analysis Can Be Made in the Circumstances of this Case for Granting Relief to the Petitioner and No Novel and Important Due Process Issue Is Raised by the Petition.

Petitioner contends that the grant of summary judgment to the respondent mother in the paternity proceeding below by the Massachusetts court denied him due process of law. He argues that as a putative father he has the right to a hearing on his claim that the respondent child was fathered by him, and that his petition presents a substantial federal question (Petition 7). He argues that the Supreme Judicial Court of Massachusetts created a "conclusive presumption preventing a natural father from asserting his patenrity in any case where

the mother was married at the time of conception" (Petition 7). Petitioner also contends that what he characterizes as a "conclusive presumption" (Petition 7) would preclude a paternity claim in the Massachusetts courts by a man when a child is conceived by a married woman even if the man supports the child, lives with the child in his formative years, and even if the mother dies (Petition 7).

The problem with the petitioner's analysis of the Massachusetts decision in this case is that it far overstates what the Supreme Judicial Court actually decided. The decision in the state court was rendered on a motion to dismiss treated as a motion for summary judgment under the Massachusetts Rules of Civil Procedure. The uncontroverted facts on which the Massachusetts court decided this case are far removed from the various hypothetical horribles cited in the petition.

The opinion of the Supreme Judicial Court of Massachusetts below makes it perfectly clear that the court held on the summary judgment issue that "*in the circumstances of this case* a man does not have a constitutional right to an adjudication of whether he is the father of a child conceived when the mother was married to another man" (App. II at 16a) [emphasis added]. Isolated dicta and quotes from the Massachusetts decision may make the opinion appear broader than it actually is, but it cannot be denied that the decision itself turned on the narrow legal and factual issues raised by the summary judgment motion.

The operative and uncontroverted facts on which the Massachusetts court decided the summary judgment question included the fact that the respondent mother was married to another man at the time of conception. But they also included other critical uncontroverted facts which are not emphasized in the petitioner's due process analysis. These include the fact that the birth certificate lists the husband of the woman as the father of the child, that the child never lived with the petitioner,

that the mother remarried the husband after the birth of the child, that the husband never denied he was the father of the child and that the mother, husband, child and another sibling have lived as a family unit since September, 1983.

It requires an indefensible leap of imagination on a record such as this to argue that in granting summary judgment on the facts set out in this record the Massachusetts court thereby created a "conclusive presumption" (Petition 7) that *every* putative father would be denied a forum for establishing paternity of *any and every child* conceived by a married woman regardless of the circumstances. Simply stated, the petition for a writ of certiorari misstates what the Massachusetts court actually did when it granted summary judgment "in the circumstances presented by this case" (App. I at 16a). The sweeping constitutional arguments set forth in support of the petition do not relate to the facts, the issues or the applicable law and procedure employed in the proceedings below.

The precedents cited by the petitioner in support of the proposition that he was denied the opportunity to be heard on a liberty interest do not support his conclusions. The cases cited in his due process analysis in the petition, deal with a radically different factual setting from those which confronted the Massachusetts court on the summary judgment issue. *Lehr* v. *Robertson*, 463 U.S. 248 (1983); *Quilloin* v. *Walcott*, 434 U.S. 246 (1978) and *Caban* v. *Mohammed*, 441 U.S. 380 (1979) deal with the rights of putative fathers of illegitimate children to notice and an opportunity to be heard before the child is adopted by a stranger. *Santosky* v. *Kramer*, 455 U.S. 745 (1982) deals with the rights of parents in parental termination proceedings. *Stanley* v. *Illinois*, 405 U.S. 645 (1972) deals with the procedural rights of the father of illegitimate children, who has had custody of the children and cohabited with the mother, to a hearing before the children are removed from his custody after the death of the mother. *Smith* v. *Organi-*

zation of Foster Families for Equality and Reform, 431 U.S. 816 (1977) deals with the removal of children from foster homes. Unlike the constitutional issues addressed in these decisions, this case focuses on the rights of a stranger to the marriage to challenge the legitmacy of a child conceived by a married woman, accepted by her husband as his child and cohabiting with his mother and her husband. This case is not different merely in degree from the various precedents cited by petitioner, but differs radically in kind.

In citing *Board of Regents* v. *Roth*, 408 U.S. 564 (1972), petitioner argues that he has a due process right to a hearing on his paternity claim. He asserts that every state court which has considered this issue has "mistakenly applied" (Petition 13) the *Roth* principles in cases involving the paternity claims of putative fathers when the mother is married to another person (Petition 13-14 and cases noted therein).

Petitioner notes that *Board of Regents* v. *Roth*, 408 U.S. 564 (1972) [involving the due process rights of an untenured teacher], and the principles which have developed from it, requires an examination of the nature of the interest at stake rather than a mere weighing of the interest in determining due process requirements. It is the nature of interest which determines due process rights. But this is the very rock on which petitioner's ship flounders. The interests of the father of an illegitimate child living in his home, the problem addressed in *Stanley* v. *Illinois*, 405 U.S. 645 (1972) (on which petitioner's argument is in great part premised), differ not just in degree but in kind from the interests of a putative unmarried father in a legitimate child living in a home with a mother and her husband. The interests protected in *Stanley* reflect a stable home environment for children and a history of association with and support for children during their formative years which is entirely lacking in the factual history on which the Massachusetts court granted summary judgment in this case.

The petitioner's claim is different not merley in weight but in kind from the claim of Mr. Stanley not to have his children taken from him without a hearing.

Unlike the children in the other decisions of this Court cited by the petition for a writ of certiorari, the child in this case was conceived by a married woman, acknowledged by her husband, and is living in a stable home environment with the mother and her husband. As the Supreme Judicial Court decided below this is a legitimate child under Massachusetts law, whose legitimacy the petitioner wishes to challenge. Petitioner places great stress on the Supreme Judicial Court's weighting of the state's interest in strengthing and encouraging of family life and legitimacy, arguing that this constitutes an impermissible pre-hearing weighing of petitioner's interest. This characterization misstates what the Massachusetts court decided. The observations of the Massachusetts court about family life and legitimacy are directed not at weighing the interests of the petitioner but at the very nature of his claim. The nature of his claim cannot be separated on a summary judgment motion from the uncontroverted facts of the case as they appeared to the court at the time of the motion. Petitioner's claim strikes at the very heart of the family stability and legitimacy of a child who lives with his mother and her husband. This is radically different in kind from a paternity claim asserted by the putative father of an illegitimate child with whom the father has a history of association and support. To argue that a claimant in the circumstances of the petitioner is entitled by due process of law to disrupt an existing family unit by challenging family stability and legitimacy is to assert a *new and radically different kind of claim* from anything previously know in American constitutional law.

II. In Granting Summary Judgment in the Circumstances of this Case Massachusetts Has Not Denied Equal Protection of the Law.

Petitioner argues that a writ of certiorari should issue because Massachusetts has created an impermissible classification burdening natural fathers, which deprives petitioner and others like him of equal protection of the law (Petition 17). This gender discrimination argument is said by petitioner to turn on different treatment accorded to natural mothers and natural fathers (Petition 17-18).

In substantial part this equal protection argument is based on a re-hashing of the due process arguments discussed *supra*, i.e. that petitioner should have standing to maintain an action of paternity. As in the due process argument the petition largely ignores most of the uncontroverted thirteen facts which were before the Massachusetts court on the summary judgment motion and goes off on a constitutional analysis of interests of the fathers of illegitimate chidren as previously examined in cases such as *Caban* v. *Mohammed*, 441 U.S. 380 (1979) and *Stanley* v. *Illinois*, 405 U.S. 645 (1972).

To the extent that the petition states a true gender-based discrimination argument it turns on the fact that the mother of a legitimate chid (as that is defined under state law on the facts of this case which were before the court on the summary judgment motion) may institute a paternity proceeding against a man while a putative father may be denied the opportunity to contest the legitimacy of a legitimate child living with a woman and her husband.

This Court has held that for a gender-based classification to meet constitutional demands of equal protection it must serve an important governmental objective and be substantially related to the achievement of that objective. *Kirchberg* v. *Feenstra*, 450 U.S. 455 (1981); *Wengler* v. *Druggists Mutual*

Ins. Co., 446 U.S. 142 (1980); *Orr* v. *Orr*, 440 U.S. 268 (1979); *Califano* v. *Goldfarb*, 430 U.S. 199 (1977); *Craig* v. *Boren*, 429 U.S. 190 (1976), *reh. den.*, 429 U.S. 1124 (1977); *Stanton* v. *Stanton*, 421 U.S. 7 (1975). However, the burden of establishing such a state objective exists only when the state has in fact imposed a gender-based classification. The categories in issue are described by petitioner as being those of "natural fathers" and "natural mothers," (Petition 18). However, the actual categories are "mothers" and "putative fathers." Mothers and putative fathers are distinguishable categories in law because of the simple fact of biology. Except possibly in some relatively rare instances involving embryo transfer, *in vitro* fertilization and other applications of embryo technology, the issue of the mother's biological relationship to the child she bore is not in any legal or factual doubt. The Supreme Court of Wyoming has aptly and properly described this legal and factual reality in rejecting a gender discrimination argument by a man who sought to establish that he was the father of a child born to a married woman:

> The classification here made is not "entirely unrelated to any differences between men and women." The differences are the very foundation of the classification. Here, they are obvious. The woman carries the child through pregnancy. When born of her, the fact of motherhood is obvious. Not so the man. The proof of fatherhood, or the proof of lack thereof, must come from an external source. The entire classification . . . is premised on this basic and obvious distinction, it is not invidious, but "realistically reflects the fact that the sexes are not similarly situated" in the circumstances. Men do not bear children and give birth to them.

A v. *X, Y and Z*, 641 P.2d 1222, 1225 (Wyo. 1982).

The petitioner's categories of "natural fathers" and "natural mothers" ignores the simple and obvious fact that nature itself dictates the disperate treatment accorded to each under the law. In the context of legal disputes involving human reproduction this Court has consistently recognized this obvious proposition. In *Roe* v. *Wade*, 410 U.S. 113, *reh. den.*, 410 U.S. 959 (1973), this Court recognized that the peculiar circumstances of pregnancy created a constitutional right in a woman to abort a fetus during the first trimester of pregnancy free of interference by the state; in *Planned Parenthood of Central Missouri* v. *Danforth*, 428 U.S. 52 (1976), this Court precluded the imposition of a veto power over the abortion by the natural father of the child. Other courts have applied this distinction between the situations of the mother and the father in circumstances which demonstrate the power of the dictates of biological fact over the power of law. For example, in *People in Interest of S.P.B.*, 651 P.2d 1213 (Colo. 1982), the court ruled that equal protection was not denied to a natural father who was obligated to support a child when the woman carried his child to term notwithstanding his demand that she have an abortion. So also in the context of paternity proceedings, the law is justified in classifying mothers whose maternity is never in doubt from fathers whose paternity may be open to question. Biological fact dictates such a distinction, and the law is helpless to change the structure of nature.

III. The Family Enjoys a Right to Privacy Against Legal Compulsion to Submit to Paternity Proceedings and Blood Testing in an Action Brought Against its Members by a Stranger.

Counsel for the child argued in the Massachusetts courts that "family interests and concerns are entitled to constitutional protections" (Brief for the child in the Massachusetts Supreme

Judicial Court), and here argues that such constitutional protections for the family unit is reason to deny the writ of certiorari. While not phrased in clear constitutional terms, it is clear from reading the opinion of the Supreme Judicial Court that the Massachusetts court was acting to protect and promote the family interests of the respondents when it granted summary judgment on the basis of the uncontroverted facts, *supra*.

"A challenge to the presumption that the husband is the child's father, brought by a stranger to the marriage, such as the plaintiff, has the likely effect of seriously disrupting an intact marriage and family contrary to the interests of the Commonwealth" (App. II at 16a). The familly involved in this case has had to live with the burden of this lawsuit since the filing of the complaint in September, 1983, and it is time to remove this burden and end this litigation by denying the petition.

The weight of this burden is apparent from this record. The mother and child were ordered by the trial judge to submit to blood testing, under threat of being prevented from presenting evidence, the jailing of the mother "until she agrees to comply with the order" and the imposition of "daily costs" (App. III at 22a).

The integrity of the family unit has found constitutional protection in the Due Process Clause of the Fourteenth Amendment, *Meyer* v. *Nebraska*, 262 U.S. 390 (1923) (right to raise one's children deemed essential), *Moore* v. *East Cleveland*, 431 U.S. 494 (1977) (right of family to choose living arrangements), the Equal Protection Clause of the Fourteenth Amendment, *Skinner* v. *Oklahoma*, 316 U.S. 535 (1942) (marriage and procreation among the basic civil rights of man), *Loving* v. *Virginia*, 388 U.S. 1 (1967) (freedom to marry a vital personal right essential to the orderly pursuit of happiness by free men), *Zablocki* v. *Redhail*, 434 U.S. 374 (1978) (right to marry is protected under doctrine of privacy), the First Amendment, *Pierce* v. *Society of Sisters*, 268 U.S. 510 (1925) (right of parents to educate their children), and the Ninth

Amendment, *Griswold* v. *Connecticut*, 381 U.S. 479 (1965) (Goldberg, J., concurring) (right of husband and wife to freely make contraceptive choice). Privacy is implicit in the First Amendment's freedom of association, *NAACP* v. *Alabama*, 357 U.S. 449 (1958). Indeed, the zone of the family's privacy has been said by this Court to emanate generally from the specific guarantees of the entire bill of rights, *Griswold* v. *Connecticut*, 381 U.S. 479 (1965). "The home derives its preeminence as the seat of family life. And the integrity of that life is something so fundamental that it has been found to draw to its protection the principles of more than one explicitly granted Constitutional right," *Poe* v. *Ullman*, 367 U.S. 497, 551-552, *reh. den.*, 368 U.S. 869 (1961) (Harlan, J., dissenting; cited with approval in *Griswold* v. *Connecticut*, *supra*).

This Court has recognized the family as the most fundamental social institution of our society, *Trimble* v. *Gordon*, 430 U.S. 762, 769 (1977). It has consistently acted to protect the "private realm of family life which the state cannot enter" *Prince* v. *Massachusetts*, 321 U.S. 158, 166, *reh. den.*, 321 U.S. 804 (1944). It would be hard to conceive a greater intrusion by the use of state judicial power into the privacy of the family than the one advocated by the petitioner in the present case. On summary judgment the state supreme court has found as uncontested fact that the child has been conceived by a married woman, acknowledged by her husband, and is being raised by the husband and wife in a family unit. Yet the petitioner seeks to contest the legitimacy of that child, and to compel the mother and child to submit to blood testing against their wills. A judge has indicated that he will consider jailing the mother if she does not submit to the blood testing. If the petitioenr prevails he will be using the judicial power of the state to intrude into the privacy of the family, threatening the tranquillity, peace and unity of the family. In her affidavit the

mother described the "great toll on us, emotionally and financially" caused by this litigation (App. I at 8a). It is time to end this emotional and financial drain on the family and deny the petition.

Conclusion.

In the circumstances of this case, no plausible due process analysis can be made for granting relief to the petitioner, and no novel and important due process issue is raised by the petition. In granting summary judgment, the Supreme Judicial Court of Massachusetts has not created any gender based classification between natural mothers and putative fathers. Further, many of the allegations of fact relied upon by the petitioner were not considered by the Supreme Judicial Court and were in fact denied by the mother in an affidavit under oath filed in the Massachusetts Probate and Family Court. For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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Table of Contents.

Appendix I — Affidavit of the petitioner D.H. 1a

Appendix II — Supreme Judicial Court opinion dated October 10, 1985 9a

Appendix III — Memorandum and order dated January 2, 1985 18a

Appendix I.

COMMONWEALTH OF MASSACHUSETTS

MIDDLESEX, SS. PROBATE COURT
DOCKET NO. 5170

D.H.,
Petitioner

VS. AFFIDAVIT OF THE PETITIONER D.H.

P.B.C.,
Respondent

I, D.H., hereby affirm that the following facts are true to the best of my knowledge and belief:

1. In September, 1972, I met W.W.H. (Bill) at Gordon College in Wenham, Massachusetts, where we were both students.

2. In May, 1974, Bill graduated from Gordon College and I shortly thereafter, in September, 1974, began nursing school at the Malden Hospital School of Nursing.

3. Bill H and I were married in March, 1975 and we moved into an apartment at Street in Malden, Massachusetts.

4. On November 17, 1977, W and I had our first child, B L H.

5. In July, 1978, Bill began a full-time graduate program at Boston University. I began working full-time as a nurse to help support our family.

8. In January, 1979, I began working at a new job as a nurse at the Whidden Hospital in Everett, Massachusetts.

7. In July, 1979, I was transferred to the emergency department of the Whidden Hospital.

8. In August, 1979, I was introduced to Dr. PBC who was a supervising physician in the emergency room at the Whidden Hospital.

9. Late in 1979 and early in 1980, Dr. C and I became friends. He made repeated efforts to develop a romantic relationship; however, I refused his repeated offers. We did become friends, and during that period he began to tell me many details about his divorce. In March, 1980, while Bill and I were having disagreements, C encouraged me to see Eve Welts, a social worker who had counselled with C during his divorce. C told me that he thought he thought Eve Welts could help me to work through my disagreements with my husband Bill, whether that meant separation or reconciliation. Also, in March, 1980, C strongly encouraged me to see Attorney David Lee who had counselled C through his divorce. C stated at that time that if I did not take some sort of legal action, and my disagreements with Bill continued, that Bill might remove our child from the area. I did see C's attorney, David Lee, and was informed that I did not need to take any legal action.

10. In May, 1980, after five years of marriage, Bill and I separated. Bill continued his studies at Boston University and began working full time at the Fernald School, while I continued in my capacity as a nurse at the Whidden Hospital. Bill and I continued to maintain contact and to mutually care for our daughter, B.

11. In July, 1980, while Bill and I were separated, I entered into a physical relationship with Dr. C. He had made many attempts to start one earlier, but I had refused. During this time, he enlisted my help with his children from a previous marriage who were in the custody of his ex-wife, RC. During this time, I did help with his children by visiting them, and became friends with his children. At the same time I was continuing with my husband, Bill, to mutually care for our daughter, B.

12. In February, 1981, my husband, Bill, discontinued his studies at Boston University to take on a second job. He began giving me additional money to help support our daughter, B. Bill and I continued to meet very regularly to do things as a family with our daughter, B.

13. In May, 1981, Bill and I had an argument about his being late picking B up for an overnight stay. Dr. C, at that point, urged me to leave B at C's house while I met Bill, "to teach him a lesson." C had been encouraging me for over a year to obtain a divorce from my husband, Bill, and on this night in May, 1981, C again urged me to see his attorney, David Lee, once again to obtain a restraining order against Bill and to take action toward a divorce. The next morning I met with attorney Bill Levine, an associate of attorney David Lee. Attorney Bill Levine stated that in addition to obtaining a restraining order it would be advantageous to file for a divorce. That afternoon, attorney Bill Levine and I appeared in Cambridge to obtain a restraining order and to file for a divorce, upon C's urging.

14. In August, 1981, my husband Bill and I began a process of reconciliation. In that same month of August, I terminated my relationship with Dr. C, never having relations with him again. Late one weekend in August, my daughter, B and I spent a weekend camping in Salisbury with my husband, Bill, and Bill and I resumed all aspects of our marriage relationship.

15. In September, 1981, Bill and I began staying together on a regular basis, and continued to have relations which we had resumed in August, 1981. On September 5, 1981, he took me out for my birthday and we spent that night together. It was on that night that we believe our son, N, was conceived.

16. In November, 1981, I told my husband Bill that I was pregnant, and we decided that we should live together and, after making arrangements, Bill moved in with me in December, 1981.

17. During this period, Bill and I discussed whether to let the divorce proceedings continue or whether to terminate the divorce proceedings. We decided to let the divorce go through because we thought it would be much easier to simply let the proceedings continue and get remarried, rather than to stop the proceedings through our attorneys. It had been a very stressful period of time since I had filed for a divorce at C's urging, and Bill and I did not wish to have any more involvement with the legal proceedings or with C.

18. In January, 1982, C called me, begged me to meet him, and asked me to meet him at a Howard Johnson's restaurant to talk. I met with him at the restaurant and told him that Bill and I were living together again, that our relationship was well, and that I was happy, and that I did not want to see C again. During this period of time, I was continuing to have contact with C's daughter, L, whom I had befriended in the previous year. However, I never, during my conversations with L, asked to meet C, and never asked L if I could meet her at C's house.

19. On June 9, 1982, the divorce decree between Bill and I became absolute. At the time, Bill and I were living together as husband and wife, holding ourselves out as a family unit with our daughter, B. At the time, we were not aware that the divorce decree had become absolute.

30. On June 10, 1982, our child, NWH, was born. His birth certificate lists my husband, WWH and myself, as the parents. At the time of N's birth, WWH acknowledged N as his child, we acknowledged ourselves as the parents of N, and continued to live together as a family.

21. In August, 1982, Dr. C's daughter, L, invited me for a visit. While I was there, Dr. C came home and stated that he was forty-one years old, and he wanted to die. When I asked him why, he refused to discuss it. He also asked if N was his child, and I told him no. He stated that he didn't think

he was. C stated he loved me, missed me, and began pressuring me to see him again. I did not want that, as Bill and I were living together again, and had resumed our family relationship. C continued to pressure me, however, and I became confused. At the time, I was experiencing post-partum depression and, as a result of the additional pressure applied by C, I began to see the only social worker with whom I had any prior experience, Eve Welts, whom I had met two years previous through Dr. C. After several sessions with Eve Welts, I refused to attend any further sessions because I felt both Eve Welts and Dr. C were encouraging me to resume my relationship with Dr. C. I did not want to continue that relationship, I loved Bill. Eve Welts did not appear sensitive to my feelings, and seemed to be aligning herself with Dr C; therefore, I discontnued counselling sessions.

During this time, in August, 1982, Dr. C became concerned about any possibility that he was N's biological father. He did not want anyone to know about our previous relationship, and did not want anything to do with N. He made me promise that I would never sue him for paternity. He never once mentioned having blood tests done. I never asked him for child support. There were no planned visits between N and C. C did see N on occasion when I was visiting C's children with whom I did have a good relationship; however, such occasions were rare, and I never intended nor wanted N to have any exposure to C for various reasons.

22. C's efforts to draw me away from my husband, Bill, and to interfere with our family relationship continued throught [*sic*] the spring of 1983. During that period, Bill and I decided that we would move out of Malden as we were looking for additional living space as a family, and we wished to find what we thought would be a better school system for our daughter, B, who was about to enter first grade in September. I wanted to live in Lexington because of the quality of the school

system, and also because Bill and I attended church at Grace Chapel in Lexington. Bill felt that Lexington was too far away for his business. Bill and I were unable to come to any agreement regarding a town, and, I therefore, had decided that I would attempt to rent an apartment in Lexington hoping that Bill would find it to be a desirable area and a convenient are, [*sic*] and therefore, change his mind about buying a house there.

23. During this period of time, in the spring of 1983, Dr. C upon hearing that I was looking for a place to live, offered to take me to a realtor in Lexington who was a friend of his, and who had sold him a house in the past. That realtor, Couette Realty, suggested that Dr. C buy a house as an investment, and rent me the house or a portion of it. Dr. C purchased a house in Lexington, with plans of converting it into an illegal two-family house, and agreed to rent me that house for $650.00 per month.

24. In June, 1983, I moved into the house in Lexington. Bill helped me to move into the house. While Bill and I disagreed as to where we ought to be living, we continued to work on provided [*sic*] a family home environment for the children. Bill, at that time, continued to provide financial support for both our children, and Bill also stayed at the house very frequently.

During the initial month I was living in Lexington, Dr. C attempted to intrude upon my family relationships, and attempted to exercise some control over me as my landlord. C would drive by the apartment late at night, complain to me later about Bill and I continuing to live together, and attempt through various means to have access to my children, B and N. Bill and I avoided these efforts by C, wanting to protect our children, B and N, from contact with C. We did have a close relationship with C's daughter L, and she continued to baby-sit for B and N. Infrequently, L would request to baby-sit at her own house for her convenience, so I brought a crib and a portable

high chair, which Bill and I had purchased for N, over to L's house for her to use in caring for N along with toys for both children. This continued until L moved back with her mother.

25. After living in Lexington for approximately one month, I realized that I had made a mistake, and that Bill was not going to change his mind about locating permanently in Lexington. Bill and I began to discuss the possibility of buying a house in another town, specifically, Wakefield, and in late July began looking for a house in that town. At that point, Dr. C became concerned about my intention to move away from Lexington, and C asked me to refrain from paying him the agreed upon $650.00 per month rent, stating that he would deduct it from the $2,000.00 I had loaned him to purchase the house. Dr. C also became much more persistent in his efforts to interfere with the family relationship that Bill and I were enjoying.

26. In August, 1983, Bill and I went on a vacation together. We had made our decision to relocate, and we had also decided to remarry in the fall.

27. Two weeks later, Dr. C filed a lawsuit against me and served me with restraining orders. I immediately moved back to Malden with Bill and our children, intending to remain there until Bill and I were able to purchase a house in Wakefield.

28. On September 12, 1983, Bill and I remarried.

29. On November 10, 1983, we purchased a two family house in Wakefield.

30. Bill and I have had a very good, solid, loving and caring relationship both during our previous marriage and since our reconciliation in August, 1981. Our relationship and our family relationship has especially flourished since our remarriage in September, 1983 and our move to Wakefield. Our marriage has never been stronger. We would like to have another child, but feel we should wait until the Court proceedings in this case have been resolved.

This Court case has taken a great toll on us, emotionally and financially. I believe that Dr. C. has taken this action out of revenge and malice as demonstrated by his actions and as demonstrated by the fact that he never acknowledged Nathaniel as his child or attempted to assert any claim to paternity for over fifteen (15) months following Nathaniel's birth. He only began to assert any claims to paternity after he realized that Bill and I were going to remarry in September, 1983.

Signed under the Pains and Penalties of Perjury, this 13th day of July, 1984.

/s/_____

D.H.

Appendix II.

COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT

P.B.C. *vs.* D.H.
Middlesex, May 8, 1985.—October 10, 1985.
Present: HENNESSEY, C.J., WILKINS, LIACOS, ABRAMS, & O'CONNOR, JJ.

CIVIL ACTION commenced in the Middlesex Division of the Probate and Family Court Department on September 6, 1983.

A pretrial motion was heard by *Edward M. Ginsburg*, J.

Leave to file an interlocutory appeal was granted in the Appeals Court by *John M. Greaney*, C.J.

The Supreme Judicial Court ordered direct appellate review on its own initiative.

Steven I. Dean for the defendant.

Malcolm M. Donahue for the minor.

Muriel N. Carpenter for the plaintiff.

O'CONNOR, J. The plaintiff in this case contends that he has a right to an adjudication of whether he is the father of a child conceived while the child's mother, the defendant, was married to another man. We hold that in the circumstances of this case he has no such right.

The complaint, filed in the Probate and Family Court, requests that the court declare the plaintiff to be the natural father of the child and that he be granted custody of the child, or, if not custody, then visitation rights. The plaintiff moved that the court order that he, the mother, and the child submit to a

Human Leukocyte Antigen (HLA) white blood cell test. A judge denied the motion. Thereafter, there were proceedings in the Appeals Court and before a single justice of this court, as well as further proceedings in the trial court, resulting in the allowance of the plaintiff's motion and an order that the plaintiff, the mother, and the child submit to the test on a specified date.

When the mother and the child failed to submit to the test, a judge of the trial court imposed sanctions by ordering that the mother would be deemed to have made certain concessions favorable to the plaintiff's claim. The plaintiff then moved that the case be scheduled for trial, but, before a trial date was assigned, the mother moved to dismiss the complaint on the ground that the plaintiff lacked standing to litigate the question of his paternity. Taking into account the earlier proceedings relative to the blood test, an affidavit that had been filed by the plaintiff, and certain "undisputed evidence," a judge concluded that allowance of the motion to dismiss at that time was inappropriate, and he denied the motion. At the same time, he ordered the mother and the child to submit to the HLA test. The order provided that the possible consequences of noncompliance would be preclusion of the mother from offering evidence at trial on the issue of paternity, incarceration until she complied with the order, and assessment of "daily costs" against her.

The next procedural step was that the mother filed in the Appeals Court a petition for review of the denial of her motion to dismiss the complaint. A single justice of that court reasoned that if the test were administered and showed that the plaintiff was the child's natural father, and if then, on appeal, it was decided that the plaintiff had no standing to assert his paternity, serious and longlasting emotional damage might unnecessarily be caused to the child. Accordingly the single justice authorized an interlocutory appeal to the Appeals Court from the denial

of the mother's motion to dismiss the complaint, and he ordered a stay of further proceedings in the trial court. We transferred the case to this court on our own initiative. We remand the case to the Probate and Family Court for the entry of an order dismissing the complaint.

The trial judge and the single justice of the Appeals Court relied on matters outside the pleadings in making their rulings. The parties, too, in their briefs on appeal, rely on facts not pleaded. Therefore, we treat the motion to dismiss as a motion for summary judgment, and we consider the facts to be those expressly or impliedly set forth in the pleadings, affidavits, and briefs of the parties, and about which there appears to be no controversy.

Those facts are as follows. For an extended period of time before September, 1981, while the mother was married to another man, the mother and the plaintiff had a sexual relationship.[1] The mother filed a complaint for divorce in May, 1981. The child was conceived the following September. A judgment of divorce nisi was entered on December 8, 1981. The divorce became final on June 9, 1982, and the child was born the next day. The child has lived with the mother since birth and has never lived with the plaintiff. Since September, 1983, the mother has not allowed the plaintiff access to the child. The complaint in this case was filed on September 6, 1983, and after that the mother and her former husband remarried.

By affidavit and in her brief the mother asserts other facts which the plaintiff appears to concede. Those facts are that her remarriage to her former husband occurred on September 12, 1983, the child's birth certificate lists her husband as the

[1] The parties dispute whether their sexual relationship continued into September, October, and November, 1981. They also dispute the extent to which the mother and her husband lived together between late 1981 and the summer of 1983. We make no assumptions as to those facts or other facts in controversy. Resolution of the controverted facts would not affect our decision.

father, the husband has never denied his paternity, and since September, 1983, the mother, her husband, the child in question, and an older child of the mother and her husband have lived together continuously. We make those assumptions.

This court has held that a child *born* to a married woman is presumed to be the child of the mother's husband. *Commonwealth* v. *Leary*, 345 Mass. 59, 60 (1962). That presumption of legitimacy may not be rebutted, even in a civil case, "except on facts which prove, beyond all reasonable doubt, that the husband could not have been the father." *Phillips* v. *Allen*, 2 Allen 453, 454 (1861). We hold today that a child *conceived* by a married woman is presumed to be the child of the man to whom the mother was then married even if the mother and the husband are divorced at the time of the child's birth. Our holding fosters the important social policy of affording legitimacy to children whenever possible. See *Powers* v. *Steele*, 394 Mass. 306, 310 (1985); *Green* v. *Kelley*, 228 Mass. 602, 605 (1917). The plaintiff has not urged us to hold otherwise. He simply argues that he should be permitted to rebut that presumption.

Here, the mother was married at the time the child was conceived. The child, therefore, is presumed to be the husband's child. Although we have held that the presumption of legitimacy may be rebutted, and we have defined the burden of proof in that regard, we have never confronted the question whether the presumption may be rebutted by a man claiming to be the child's natural father. Nor does any statute answer the question.

The question was not before us in *Normand* v. *Barkei*, 385 Mass. 851, 853 (1982), on which the plaintiff relies as support for his contention that he has a right to prove that he is the child's father. *Normand* v. *Barkei, supra,* sheds little light on the issue before us because in that case the children's mother was unmarried when the children were conceived and were

born. There was no question of legitimacy. The plaintiff simply sought an order granting him visitation rights with respect to two children unquestionably illegitimate, that he claimed were his children.

We must decide for the first time, then, whether, in the circumstances of this case, a man is constitutionally entitled to a judicial determination of whether he is the natural father of a child conceived while the mother was married to another man. We conclude that he does not have that constitutional right. We further conclude, as a matter of public policy, that in the circumstances of this case we should not recognize in the plaintiff a common law right to a paternity adjudication.

The plaintiff contends that denying him the opportunity to establish his paternity would deprive him of the due process of law guaranteed by the Fourteenth Amendment to the United States Constitution. He relies on *Stanley* v. *Illinois*, 405 U.S. 645 (1972). In that case, the Supreme Court stated, "The private interest here, that of a man in the children he has sired and raised, undeniably warrants deference and, absent a powerful countervailing interest, protection." *Id* at 651. An understanding of the meaning and limits of that statement is aided by an appreciation of the context in which the statement was made. *Stanley* involved an *acknowledged* father's efforts to prevent his children from being declared wards of the State upon the death of their mother with whom Stanley had intermittently lived for eighteen years. At the time of the conception and birth of the children, the mother was unmarried, as was Stanley. Unlike this case, no presumption of legitimacy was involved. An Illinois statute, conclusively presuming that a father of an illegitimate child is an unfit parent, provided that upon the mother's death the child would automatically become a ward of the State. Focusing on the "cognizable and substantial" interest of a man in the children "he has sired and raised," the Supreme Court held that the conclusive presumption deny-

ing Stanley a right to be heard on his fitness as a parent violated Stanley's right to due process. *Id.* at 649-652.

We continue to recognize, as we did in *Normand* v. *Barkei*, *supra*, that ordinarily and unwed father has a legally protectable interest in his children, and that he is entitled to establish that he is their natural father. But it does not follow, and *Stanley* v. *Illinois*, *supra*, does not require, that, in all circumstances, a man claiming to be the father of a child conceived while the child's mother is married to another man is constitutionally entitled to be heard on the question of paternity.

As the plaintiff recognizes in his brief, "the guaranty of due process. . .demands only that the law shall not be unreasonable, arbitrary or capricious, and that the means selected shall have a real and substantial relation to the object sought to be attained." *Nebbia* v. *New York*, 291 U.S. 502, 525 (1934). The Commonwealth has legitimate and strong interests in "the strengthening and encouragement of family life for the protection and care of children." G.L. c. 119, § 1 (1984 ed.), and in affording legitimacy to children. *Powers* v. *Steele*, 394 Mass. 306, 310 (1985). Denying a plaintiff the right to establish his paternity in the circumstances of this case promotes those interests. Not only was the child's mother married to a man other than the plaintiff when the child was conceived, but also the husband (the presumed father) has never denied that he is the child's natural father. Furthermore, the child's mother and the presumed father have been remarried almost since the filing of the complaint herein, and, since that time, they have continued to maintain a family unit which includes the child. Although appropriate social policy might be clearer if the marriage had been uninterrupted since the child was conceived, we are satisfied that, in the circumstances obtaining here, denying the plaintiff a right to litigate his paternity bears a substantial relationship to the aforementioned interests of the Commonwealth, and, therefore, does not violate the plaintiff's

right to due process. Here, unlike in *Stanley* v. *Illinois, supra*, there is a "powerful countervailing interest" that justifies withholding the relief the plaintiff seeks. Our holding finds support in other jurisdictions. See *Vincent B.* v. *Joan R.*, 126 Cal. App.3d 619, 624-627 (1981); *Petitioner F.* v. *Respondent R.*, 430 A.2d 1075, 1078-1079 (Del. 1981); *A.* v. *X, Y, and Z*, 641 P.2d 1222, 1226-1227 (Wyo. 1982).

The plaintiff's constitutional argument is not limited to the due process clause of the Fourteenth Amendment. He relies also on the Fourteenth Amendment's equal protection clause and on art. 106 of the Amendments to the Constitution of the Commonwealth (the Equal Rights Amendment). The plaintiff's sole argument regarding these constitutional provisions is that to deny him the right to seek an adjudication of his paternity while allowing the child's mother to do so[2] is to establish classifications based on sex, and that such classification is not constitutionally justified by its relationship to any sufficiently important interest of the Commonwealth. It is true that "[g]ender-based distinctions 'must serve important governmental objectives and must be substantially related to achievement of those objectives' in order to withstand judicial scrutiny under the Equal Protection Clause." *Caban* v. *Mohammed*, 441 U.S. 380, 388 (1979), quoting *Craig* v. *Boren*, 429 U.S. 190, 197 (1976). It is also true that "classification based on sex is subject to strict judicial scrutiny under the State [Equal Rights Amendment] and will be upheld only if a compelling interest justifies the classification and if the impact of the classification is limited as narrowly as possible consistent with its proper purpose." *Lowell* v. *Kowalski*, 380 Mass. 663, 666 (1980). But those constitutional principles do not apply in this case because the

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[2] "The mother herself is the proper party to seek a complaint for adjudication of paternity, for expenses of the pregnancy and support of the child." *Baby X* v. *Misiano*, 373 Mass. 265, 265 (1977).

described classifications are not gender-based. Not only mothers, but presumed fathers as well, may initiate proceedings raising the issue of the child's paternity. *Symonds* v. *Symonds*, 385 Mass. 540, 544 (1982).

That the distinction between those who may initiate paternity proceedings and those who may not do so is not based on sex is enough to defeat the plaintiff's argument. Further discussion, however, is appropriate. Even though no gender-based classification has been established, "[e]qual protection of the laws requires. . . .that all persons in the same category and in the same circumstances be treated alike." *Opinion of the Justices*, 332 Mass. 769, 779-780 (1955). That requirement is met here. The plaintiff is not "in the same category and in the same circumstances" as the mother and her husband, the presumed father, who, with the child in question and another child, constitute a family unit. A challenge to the presumption that the husband is the child's father, brought by a stranger to the marriage, such as the plaintiff, has the likely effect of seriously disrupting an intact marriage and family contrary to the interests of the Commonwealth. When the same challenge is made by someone within the family, the ruptures in the marriage and family, most often, have already taken place, and even when the family is intact, those within the family are in far better position than is an outsider fairly to decide whether the family can survive the challenge presented by litigation of the paternity issue. These considerations justify treating persons outside the family differently from persons within it. *Vincent B.* v. *Joan R.*, *supra* at 627; *Petitioner F.* v. *Respondent R.*, *supra* at 1080; *A.* v. *X, Y, and Z*, *supra* at 1224-1226. But see *R. McG.* v. *J.W.*, 200 Colo. 345, 349-354 (1980).

We conclude that in the circumstances presented by this case a man does not have a constitutional right to an adjudication of whether he is the father of a child conceived while the child's mother was married to another man. Also, because of

the social policy we have discussed above in favor of affording legitimacy to children, whenever possible, and of "strengthening and encourag[ing] family life for the protection and care of children," we conclude that we should not recognize in the plaintiff a common law right to such an adjudication. We express no opinion as to whether the child could, at some point, for the purpose of establishing inheritance rights or for any other purpose, bring an action attempting to prove that the plaintiff is his natural father. We remand the case to the Probate and Family Court with instructions to enter an order dismissing the plaintiff's complaint.

So ordered.

Appendix III.

COMMONWEALTH OF MASSACHUSETTS
PROBATE & FAMILY COURT
MIDDLESEX DIVISION
No. 5170

P B C
v.
D H

MEMORANDUM AND ORDER

This matter came on before the court for hearing on plaintiff's Motion to Compel and for Sanctions, and on defendant's Motion to Dismiss for Failure to State a Claim upon which relief can be Granted and on plaintiff's Motion for Trial Date Certain. Present were the attorney for the plaintiff, Muriel Carpenter; the attorneys for the defendant, Steven Dean and Harley Anderson; and the attorney for the minor child, Malcolm Donahue.

The central issue in the case at this stage concerns the paternity of the minor child, N H . Mr. and Mr. H were divorced by a Judgment of Divorce Nisi dated December 8, 1981 which became final on June 9, 1982. At the time of the divorce, the H's had one (1) child. Mrs. H was three (3) months pregnant with N at the time of the Judgment of Divorce Nisi. It is undisputed that the plaintiff and D H had an intimate relationship which extended over a period of time, the exact time of the beginning and of the end of the relationship is in dispute. Mr. and Mrs.

H were remarried in September, 1983, after the commencement of the current action.

The current action has been before the Trial Court, a Single Justice of the Appeals Court (on two occasions), the full panel of the Appeals Court (which declined to hear the matter), and a Single Justice of the Supreme Judicial Court on the question as to whether all of the parties should be compelled to submit to the HLA Blood Grouping Tests, and on the issue of the appropriate sanctions for failure to submit to the tests. Initially, the Trial Court refused to order the defendant, D H , and the child to submit to the HLA Blood Grouping Tests. Based on the strong showing made in the petitioner's affidavit, which is substantially unrebutted by the defendant and the high degree of accuracy of the HLA Blood Grouping Tests for determining paternity Chief Justice Greaney concluded that it was an abuse of discretion for the trial judge to deny the petitioner's Motion for the test as evidence in the petitioner's pending Probate and Family Court action to establish paternity. Mr. Justice Wilkins of the Supreme Judicial Court declined to exercise jurisdiction under G.L. c. 211, § 3 to vacate the order for blood tests.

Upon remand Associate Justice Coffey of the Middlesex Probate and Family Court ordered all parties to submit to the HLA Blood Grouping Tests. When the defendant, D H , refused to comply Judge Coffey imposed as a sanction the suggestion of Associate Justice Wilkins of the Supreme Judicial Court that she would be taken to have conceded that the tests would not exclude the petitioner's paternity and that the plaintiff would be entitled to show the significance of that concession on a percentage basis. The plaintiff appealed the sanction as being inadequate and the original sanction was sustained by Chief Justice Greaney of the Appeals Court as not constituting an abuse of discretion.

The plaintiff appeared before this Judge on December 19, 1984 seeking to set a trial schedule. Without having any prior

knowledge of the proceedings enumerated above, this court suggested that the HLA Blood Grouping Tests was the most probative evidence on the issue of paternity and suggested that an appropriate motion be filed in order that the court might deal with the issue before establishing a trial date.

In view of the long involvement of Associate Justice Coffey with this case, inquiry was made whether he sought to retain jurisdiction. Counsel informed the court that Associate Justice Coffey was not retaining jurisdiction of this matter and have so stated on the record. The court notes that by a second Motion for custody, visitation and sanctions, the plaintiff, on September 20, 1984 sought among other things to have a finding entered that the plaintiff be declared the natural father of the minor child. The Motion was based on the refusal of the defendant to submit to the HLA Blood Grouping Tests. Associate Justice Coffey denied the Motion "without prejudice to be re-submitted at the time of trial."

This court is now faced with a serious dilemma. The defendant now seeks to have the matter dismissed on the grounds that only the husband and wife have standing to challenge the paternity of a child conceived during coverture. Although this question has not specifically been raised until now, the matter was impliedly considered by Chief Justice Greaney of the Appeals Court in his statement concerning the strong showing made in the petitioner's affidavit. In the petition before Mr. Justice Wilkins under G.L. c. 211, § 3 to vacate the order for the blood tests, Justice Wilkins stated, "It is not argued here that a man in the position of C has no right to have his request for visitation considered, assuming he is found to be the child's father." In view of the prior proceedings in this case involving the propriety of the blood tests, and the showing of the plaintiff in his Affidavit and the undisputed evidence in this case, this court does not believe that a Motion to Dismiss is appropriate at this time. Whatever the merits of the defend-

ant's position can be preserved and, if necessary, argued on appeal after the case has been determined on the merits. To encourage further piecemeal appellate review of this issue under the circumstances of this case would be inappropriate. All parties are entitled to some finality.

With respect to the trial of the case on the merits, this court is concerned with the adequacy of the current sanction for failure to submit to the HLA Blood Grouping Tests. On the one hand, the defendant may have good reason for refusing to take a test which has the possibility of producing highly probatives evidence which could not only illegitimatize her child, but also seriously disrupt her current family situation. On the other hand, the plaintiff has stated a sufficient case so as to pursue his claim seeking to establish paternity. At this point in time when the line between children born in and out of wedlock is nowhere near as strong as it once was, and no one questions that the HLA Blood Grouping Tests has a degree of accuracy far greater than the old exclusionary test, the court is most reluctant to proceed without obtaining the best available evidence. If the test is properly given, no significant physical intrusion of any of the parties is involved. If the test is not taken the court may well be deprived of the most probative available evidence in determining the constitutional rights of all the parties involved.

Another question which arises by the failure to obtain the most probative available evidence concerns the burden of proof. Where a plaintiff seeks to establish a paternity in a situation which would not only illegitimatize a child conceived during coverture, but would also be potentially disruptive of an intact family, the burden of proof may be more than the customary civil standard. Under these circumstances, the results of a properly administered HLA Blood Grouping Tests are even more compelling. The HLA Blood Grouping Tests has the potentiality of affirmatively determining paternity. The

current imposed sanction places the court in the same position it was in with respect to blood grouping tests as existed prior to the HLA Blood Grouping Tests.

In view of all of the above, it is hereby Ordered that:

1. The defendant's Motion to Dismiss for Failure to State a Claim upon which Relief can be Granted is denied.

2. The defendant is ordered to appear and produce the minor child, N H , for HLA Blood Grouping Tests within thirty (30) days at a time and a place to be arranged by all counsel. If the defendant has not complied with the order to participate in the HLA Blood Grouping Tests, she shall appear before this court on Tuesday February 12, 1985 at 9:00 a.m. at which point the court will consider, among others, the following sanctions: (a) that the defendant be foreclosed from presenting any evidence of any kind whatsoever, whether in her case, or in rebuttal of the plaintiff's case pertaining to the issue of paternity; (b) that the defendant be incarcerated until she agrees to comply with the order; (c) that the defendant be assessed daily costs until she complies with the order.

3. Associate Justice Edward M. Ginsburg shall retain exclusive jurisdiction over all aspects of this case.

By the Court,

January 2, 1985
Date

s/ EDWARD M. GINSBURG
EDWARD M. GINSBURG
ASSOCIATE JUSTICE